

Message Text

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ACTION OES-05

INFO OCT-01 EA-07 ISO-00 HEW-02 L-03 /018 W

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R 191355Z JAN 76

FM AMEMBASSY TOKYO

TO SECSTATE WASHDC 6179

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DEPT. PASS TO DHEW/OIH AND NIH

E.O. 11652: N/A

TAGS: TBIO OSCI JA

SUBJ: PROPOSED NIH KOBATA RESEARCH CONTRACT

REF: 75 STATE 285352, 75 TOKYO 18071

1. AS PLANNED (75 TOKYO 18071), SCICOUNS MET ON JAN. 16 WITH NUMATA DEPDIR FIRST NORTH AMERICA DIV., MOFA), TANAKA (SAME DIVISION) AND DR. NAKAI TO TRY TO DEVELOP STRATEGY FOR PRESENTING REVISED KOBATA CONTRACT TO MOE. PROPOSED FIXED-PRICE CONTRACT WITH EXAMINATION-OF-RECORDS CLAUSE DELETED WAS REVIEWED IN TERMS OF PARTICIPANTS' UNDERSTANDING OF PREVIOUS GOJ OBJECTIONS TO AWARD OF CONTRACT. NUMATA REFERRED TO 1967 LETTER FROM EMBASSY TO MOFA WHICH COMMENTED ON FOUR POINTS OF CONFLICT AT THAT TIME: (A) PATENT AND COPYRIGHT ASSIGNMENT BY CONTRACTOR TO USG; (B) RIGHT OF AUDIT BY USG; (C) USG RIGHT TO TERMINATE CONTRACT, E.G., FOR CONVENIENCE OF GOVERNMENT; (D) USG RIGHT TO RETAIN CONTROL OVER EQUIPMENT FURNISHED UNDER CONTRACT. HE ALSO MENTIONED THAT A FIFTH POINT OF CONTENTION MIGHT ARISE IN THAT PRESIDENTS OF NATIONAL UNIVERSITIES ARE GIVEN AUTHORITY UNDER GOJ EDUCATIONAL POLICY TO REJECT CONTRACTS ON GROUNDS THAT SUCH CONTRACTS INTERFERE WITH THE EDUCATIONAL PROCESS. IN OTHER WORDS, THIS LAST ISSUE MAY COME UP EVEN IF THE OTHER FOUR ARE RESOLVED WITH MOE.

2. PROPOSED CONTRACT WAS REVIEWED BY GROUP TO BEST OF ITS ABILITY. POINTS (A) AND (B) APPEARED TO HAVE BEEN RESOLVED, IN THAT THERE IS NO MENTION OF PROCEDURE FOR ASSIGNING PATENTS OR COPYRIGHTS TO USG, LIMITED OFFICIAL USE

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AND THAT REMOVAL OF CLAUSE 10 OF GENERAL PROVISIONS NEGATES USG

AUDIT RIGHT. HOWEVER, DEFAULT CLAUSE (CLAUSE 11 OF GENERAL PROVISIONS) STILL SEEMED TO GOJ REPS TO GIVE USG RIGHT OF TERMINATION UNDER CERTAIN CONDITIONS, AND ARTICLE X OF SPECIAL PROVISIONS APPEARS TO GIVE USG CONTROL TO SOME DEGREE OVER EQUIPMENT PURCHASED OR FURNISHED UNDER CONTRACT. GOJ REPS ALSO EXPRESSED CONCERN THAT EVEN IF LANGUAGE OF CONTRACT WERE SILENT ON POINTS OF CONTENTION, OTHER US LAWS AND REGULATIONS MIGHT BE APPLICABLE, SINCE ARTICLE VII OF SPECIAL PROVISIONS PROVIDES THAT ADJUDICATION OF DISPUTES WOULD OCCUR IN COURTS OF THE US. EMBOFF RESPONDED THAT HIS READING OF FILES INDICATED THAT ONLY AUDIT ISSUE REMAINED AND THAT WAS REASON WHY CONTRACT HAD BEEN RESUBMITTED WITH CLAUSE 10 DELETED. THIS REASONING WAS SUPPORTED IN PART BY LETTER FROM DR. LAMONT-HAVERS, NIH, TO DR. NAKAI DATED 6/30/75. (NAKAI HAD PROVIDED COPIES OF LETTER TO EMBOFF AND GOJ REPS). EMBOFF POINTED OUT, AND OTHERS AGREED, THAT IF MOE WISHED TO FIND TECHNICAL REASONS FOR REJECTION OF CONTRACT, THIS WOULD ALWAYS BE POSSIBLE, AND THEREFORE ISSUE BOILED DOWN TO WHETHER CONTRACT WAS POLITICALLY ACCEPTABLE TO GOJ.

3. GROUP THEN AGREED THAT FOLLOWING STEPS WOULD BE TAKEN NEXT:

(A) MOFA WILL APPROACH MQE TO GET FEELING FOR POSSIBLE REACTION TO REQUEST FOR RECONSIDERATION OF PROPOSED CONTRACT, WITHOUT ACTUALLY SUBMITTING CONTRACT TO MOE AT THIS TIME (I.E., ATTEMPT WILL BE MADE TO FIND OUT IF POLITICS IS STILL GOVERNING FACTOR); (B) NAKAI WILL TALK TO DR. KAYA, PRESIDENT OF JAPAN SOCIETY FOR PROMOTION OF SCIENCE, ON CONFIDENTIAL BASIS, TO ENLIST HIS SUPPORT FOR CONTRACT IN QUESTION AND POSSIBLY OTHER FUTURE CONTRACTS FROM NIH TO GOJ SICIENTISTS, ON GROUND THAT THIS WOULD GREATLY STRENGTHEN US/JAPAN COOPERATION IN SCIENTIFIC RESEARCH, BUT TAKING INTO ACCOUNT FACT THAT JSPPS RECEIVES MOST OF ITS FUNDING FROM MOE AND PROBABLY CANNOT BE TOO AGRESSIVE; (C) EMBASSY WILL MAKE CHECK WITH DEPT. AND DHEW ON WHAT LEGAL/CONTRACTUAL OBLIGATIONS ON PART OF GOJ ARE ENTAILED OTHER THAN THROUGH SPECIFIC WORDING OF CONTRACT, AS DISCUSSED IN PARA 2 ABOVE.

4. CONCERNING EMBASSY ACTION ABOVE, WE RECALL THAT AT ONE TIME MEETING OF LEGAL/CONTRACTUAL EXPERTS OF TWO COUNTRIES WAS PLANNED AS PART OF NEGOTIATIONS BECAUSE OF GREAT DISSIMILARITY IN CONTRACT LAWS. MEETING NEVER TOOK PLACE TO OUR KNOWLEDGE. FURTHERMORE, BOTH EMBASSY AND MOFA ARE HAMPERED BY FACT THAT NEITHER HAS STAFF MEMBER ON HAND WHO IS PERSONALLY FAMILIAR WITH ENTIRE HISTORY OF THIS LIMITED OFFICIAL USE

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PROTRACTED PROBLEM. ANY ADVICE OR INSTRUCTIONS THAT CAN BE FURNISHED BEFORE NEXT ROUND OF NEGOTIATIONS WOULD BE HELPFUL. ASST. SECY. KRATZER WAS INVOLVED IN EARLY 1975 NEGOTIATIONS AND DEPT. RETIRED OFFICER R.T. WEBBER WAS RESPONSIBLE FOR NEGOTIATIONS IN 1967 PERIOD. MUMATA ALSO REQUESTS THAT WE FURNISH HIM WITH LEGAL DESCRIPTION OF QTE FIXED PRICE CONTRACT UNQTE, SINCE THIS FORM OF CONTRACT APPARENTLY NOT USED IN JAPAN. DHEW REQUESTED PROVIDE STATEMENT.

5. EMBASSY IMPRESSION IS THAT MOFA WILLING TO TAKE UP CUDGELS
TO LIMITED EXTENT WITH MOE. MOFA IS QUITE AWARE THAT IF MATTER
BECOMES KNOWN TO SOCIALIST MEMBERS OF DIET, LATTER MAY WISH TO
USE ISSUE TO CAUSE EMBARRASSEMNTN TO GOVERNMENT. ANY HINT OF THIS
COULD WELL CAUSE MOFA TO BACK OFF AT A TIME WHEN DIET IS IN SESSION,
AND WHEN NEW CONFRONTATIONS ARE BEING AVOIDED IN PERIOD PRECEDING
LOWER HOUSE ELECTIONS.
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: RESEARCH, CONTRACTS, SCIENTIFIC GRANTS
Control Number: n/a
Copy: SINGLE
Draft Date: 19 JAN 1976
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: morefirh
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1976TOKYO00766
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D760019-1012
From: TOKYO
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1976/newtext/t19760143/aaaablym.tel
Line Count: 123
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION OES
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 76 STATE 285352, 76 TOKYO 18071
Review Action: RELEASED, APPROVED
Review Authority: morefirh
Review Comment: n/a
Review Content Flags:
Review Date: 02 JUN 2004
Review Event:
Review Exemptions: n/a
Review History: RELEASED <02 JUN 2004 by GarlanWA>; APPROVED <02 JUN 2004 by morefirh>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
04 MAY 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: PROPOSED NIH KOBATA RESEARCH CONTRACT
TAGS: TBIO, OSCI, JA, US
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 04 MAY 2006